C-8353 SUPREME COURT OF TEXAS CASES 011
EDGEWOOD INDEPENDENT SCHOOL DISTRICT, ET AL. V. KIRBY, 1988-89
WILLIAM, ET AL. (3RD DISTRICT)

C 8353

NO. C-8353



IN THE

SUPREME COURT OF TEXAS

EDGEWOOD INDEPENDENT SCHOOL DISTRICT, ET AL.,

Petitioners

V.

WILLIAM KIRBY, ET AL.,

Respondents

BRIEF OF AMICUS CURIAE IN SUPPORT OF
PETITIONERS' AND PETITIONER-INTERVENORS'

ESCANDON ELEMENTARY SCHOOL
McALLEN INDEPENDENT SCHOOL DISTRICT
2901 Colbath
McAllen, Texas 78501

NO. C-8353

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# BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONERS AND PETITIONER-INTERVENORS

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TO THE SUPREME COURT OF TEXAS:

Amicus Curiae, Escandon Elementary School from the McAllen Independent School District, file this Brief in Support of Petitioners, Edgewood Independent School District, et al., and Petitioner-Intervenors, Alvarado Independent School District, et al.

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TEXAS CONSTITUTION

## STATEMENT OF JURISDICTION AND JURISPRUDENTIAL IMPORTANCE

Jurisdiction exists under Section 22.001(a)(1), (2), (3), (4), and (6) of the Texas Government Code Annotated (Vernon 1988): a lengthy dissenting opinion was filed in the court of appeals below; the Dallas Court of Appeals has ruled differently from the court of appeals in this case on a question of law material to a decision of this case, Stout v. Grand Prairie I.S.D., 733 S.W.2d 290, 294 (Tex.App. -- Dallas 1987, writ ref'd n.r.e.) (holding that education is a fundamental right under the Texas Constitution); this case involves the construction or validity of a statute necessary to the determination of the case (Tex. Educ. Code §16.001, et seq.); this case involves the allocation of state revenue; and the court of appeals below has committed an error which is of "importance to the jurisprudence of the state." If left uncorrected, the judgement of the court of appeals will deny a significant percentage of Texas school children an equal educational opportunity. If ever a case demanded discretionary review, it is this one.

## INTEREST OF THE AMICUS CURIAE

The undersigned are officials of school districts in Texas and others concerned with the quality of public education in this State. Our interest is in the education of the children of Texas.

The trial court's extensive findings of fact have been undisturbed on appeal. These fact findings depict well the gross inequity of the Texas school finance system. It is these inequities and disparities that we, like all school districts of limited taxable wealth, confront and combat on a daily basis.

There is a vast disparity in local property wealth among the Texas school districts. (Tr. 548-50).[1] The Texas school finance system relies heavily on local district taxation. (Tr. 548). These two factors result in enormous differences in the quality of educational programs offered across the State.

There is a direct positive relationship between the amount of property wealth per student in a district and the amount the district spends on education. (Tr. 555). Because their tax bases are so much lower, poorer districts must tax at higher tax rates than the wealthier districts. Even with higher tax rates, however, poorer districts are unable to approach the level of expenditures maintained by wealthier districts. Wealthier districts, taxing at much lower rates, are able to spend significantly more per student. Conversely, poorer districts endure a much higher tax burden, yet are still unable to adequately fund their educational programs.

The interdependence of local property wealth, tax burden, and expenditures, which is so debilitating to the property-poor school districts, is revealed in numerous fact findings of trial court. For example, the wealthiest school district in Texas has more than $14,000,000 of property wealth per student, while the poorest district has approximately $20,000 of property wealth per student, a ratio of 700 to 1. (Tr. 548). The range of local tax rates in 1985-86 was from $.09 (wealthy district) to $1.55 (poor district) per $100.00 valuation, a ratio in excess of 17 to 1. By comparison, the range of expenditures

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[1]The Transcript is cited as "Tr." The pages of the Transcript cited in this Brief contain the trial court's Findings of Fact and Conclusions of Law.

per student in 1985-86 was from $2,112 per student (poor district) to $19,333 (wealthy district). (Tr. 550-52).

As the trial court found, differences in expenditure levels operate to "deprive students within the poor districts of equal educational opportunities." (Tr. 552). Increased financial support enables wealthy school districts to offer much broader and better educational experiences to their students. (Tr. 559). Such better and broader educational experiences include more extensive curricula, enhanced educational support through additional training materials and technology, improved libraries, more extensive counseling services, special programs to combat the dropout problem, parenting programs to involve the family in the student's educational experience, and lower pupil-teacher ratios. (Tr. 559). In addition, districts with more property wealth are able to offer higher teacher salaries than poorer districts in their areas, allowing wealthier districts to recruit, attract, and retain better teachers for their students. (Tr. 559).

The denial of equal educational opportunities is especially harmful to children from low-income and language-minority families. As the trial court found, "children with the greatest educational needs are heavily concentrated in the State's poorest districts." (Tr. 562). It is significantly more expensive to provide an equal educational opportunity to low-income children and Mexican American children than to educate higher income and non-minority children. (Tr. 563). Therefore, the children whose need for an equal educational opportunity is greatest are denied this opportunity.

Not only are the disparities and inequities found to exist by the trial court shocking, they render the Texas school finance system constitutionally infirm.

## ARGUMENT

### I. THE TEXAS SYSTEM OF FUNDING PUBLIC EDUCATION VIOLATES THE STATE CONSTITUTIONAL GUARANTEE OF EQUAL RIGHTS (Op. 3-13).

### A.

The denial of equal educational opportunity violates a fundamental right under the Texas Constitution. "Fundamental rights have their genesis in the expressed and implied protections of personal liberty recognized in federal and state constitutions." Spring Branch I.S.D. v. Stamos, 695 S.W.2d 556, 560 (Tex. 1985). Recognizing that education is "essential to the preservation of the liberties and the rights of the people," Article VII, Section 1 imposes a mandatory duty upon the Legislature to make suitable provision for the support and maintenance of an efficient school system. See, e.g., Bowman v. Lumberton I.S.D., 32 Tex.Sup.Ct.J.104, 106 (Dec. 7, 1988). Article I, Section 3 guarantees the equality of rights of all citizens. It is in these two constitutional provisions that equal educational opportunity has its genesis as a fundamental right in the Texas Constitution.

Thus, our state constitution, unlike the federal Constitution, expressly declares the fundamental importance of education. Education

provides the means -- the capacity -- to exercise all critical rights and liberties. Education gives meaning and substance to other fundamental rights, such as free speech, voting, worship, and assembly, each guaranteed by the Texas Constitution. A constitutional linkage exists between education and the "essential principles of liberty and free government," protected by the Texas Bill of Rights. Tex. Const., Art. I, Introduction to the Bill of Rights.

The Texas Legislature and Texas courts have also recognized that the Texas Constitution protects against the denial of equal educational opportunity. In authorizing the creation of the Gilmer-Aikin Committee to study public education in Texas, the Legislature recognized "the foresight and evident intentions of the founders of our State and the framers of our State Constitution to provide equal educational advantages for all." Tex. H.C.Res. 48, 50th Leg. (1948). Moreover, Section 16.001 of the Texas Education Code, enacted in 1979, recognizes the policy of the State of Texas to provide a "thorough and efficient" education system "so that each student ... shall have access to programs and services ... that are substantially equal to those available to any other similar student, notwithstanding varying local economic factors." Two courts have concluded that Article VII, Section I's efficiency mandate connotes equality of opportunity. Mumme v. Marrs, 40 S.W.2d 31 (Tex. 1931); Watson v. Sabine Royalty, 120 S.W.2d 938 (Tex.Civ.App. -- Texarkana 1938, writ ref'd). Finally, the only other Texas appellate court to directly confront the fundamental right question has concluded, citing Article VII, that education is indeed a fundamental right

guaranteed by the Texas Constitution. Stout v. Grand Prairie I.S.D., 733 S.W.2d 290, 294 (Tex.App.-- Dallas 1987, writ ref'd n.r.e.).

B.

Wealth is a suspect category in the context of discrimination against low-income persons by a state school finance system. Serrano v. Priest (II), 18 Cal.3d 728, 557 P.2d 929,957, 135 Cal. Rptr. 345 (1976). In addition, a fundamental right cannot be denied because of wealth. Shapiro v. Thompson, 394 U.S. 618, 22 L.Ed.2d 600 (1969). Justice Gammage, in his dissenting opinion, ably distinguishes San Antonio I.S.D. v. Rodriguez, 411 U.S. 1, 36 L.Ed.2d 16 (1973), the sole case relied upon by the Court of Appeals in its suspect classification analysis. (Diss.Op. 9-10). The Rodriguez Court observed: "there is no basis on the record in this case for assuming that the poorest people -- defined by reference to any level of absolute impecunity -- are concentrated in the poorest districts." 36 L.Ed.2d at 37 (emphasis added). Unlike the Rodriguez Court, this Court now benefits from a record replete with substantiated and undisputed findings on the wealth issue. (Tr. 562-565). For example, "[t]here is a pattern of a great concentration of both low-income families and students in the poor districts and an even greater concentration of both low-income students and families in the very poorest districts." (Tr. 563).

C.

Because the Texas school finance system infringes upon a fundamental right and/or burdens an inherently suspect class, the system is subject to strict or heightened equal protection scrutiny. Stamos, 695 S.W.2d at 560. This standard of review requires that the infringement upon a fundamental right, or the burden upon a suspect class must be "reasonably warranted for the achievement of a compelling governmental objective that can be achieved by no less intrusive, more reasonable means." T.S.E.U. v. Department of Mental Health, 746 S.W.2d 203, 205 (Tex.. 1987). The Texas school finance system surely cannot survive this heightened level of scrutiny. Even the United States Supreme Court recognized as much in Rodriguez. 36 L.Ed.2d at 33.

D.

Neither does the Texas school finance system satisfy rational basis analysis. In Whitworth v. Bynum, 699 S.W.2d 194 (Tex. 1985), this Court articulated its own rational basis test to determine the reach of the equal rights provision of the Texas Constitution. Drawing upon the reasoning of Sullivan v. University Interscholastic League, 599 S.W.2d 170 (Tex. 1981), the Court fashioned a "more exacting standard" of rational basis review. Whitworth, 699 S.W.2d at 196. As the Court stated in Sullivan, equal protection analysis requires the court to "reach and determine the question whether the classifications drawn in a

statute are reasonable in light of is purpose." Sullivan, 616 S.W.2d at 172. The Texas school finance system cannot withstand review under the Texas rational basis test. "Local control" has been proffered as a justification, but this concept marks the beginning, not the end, of the inquiry. Local control does not mean control over the formation or financing of school districts. These are State functions, for school districts are "subdivisions of state government, organized for convenience in exercising the governmental function of establishing and maintaining public free schools for the benefit of the people." Lee v. Leonard I.S.D., 24 S.W.2d 449, 450 (Tex.Civ.App. -- Texarkana 1930, writ ref'd).

In contrast to local control, there are two constitutionally and statutorily stated purposed underlying the Texas school finance system: First, Article VII, Section 1, of the Constitution commands the Texas Legislature to "establish and make suitable provision for the support and maintenance of an efficient system of public free schools." Second, Section 16.001 of the Texas Education Code expresses the State policy that "a thorough and efficient system be provided ... so that each student ... shall have access to programs and services ... that are substantially equal to those available to any other similar student, notwithstanding varying local economic factors."

The Texas school finance system is not rationally related to any of the above-discussed alleged or actual purposes. The trial court made a number of fact findings which bear directly upon the rationality of

the system. The findings reveal the vast disparity in property wealth (Tr. 548-49), tax burden (Tr. 553-55), and expenditures (Tr. 551-60); the failure of state allotments to cover the real cost of education (Tr. 565-68); and the denial of equal educational opportunity to many Texas school children (Tr. 601). The irrationality endemic to the Texas system of school finance has also been recognized, and criticized, by every serious study of public education in Texas ever undertaken, including the Statewide School Adequacy Survey, prepared for the State Board of Education in 1935; the Gilmer-Aikin Committee Report of 1948; and the Governor's Committee on Public School Education Report of 1968.

E.

Finally, the Texas system of funding public education is in no way legitimated or authorized by Article VII, Section 3 of the Texas Constitution. That section merely authorizes the Legislature to create school districts and, in turn, to authorize those districts to levy ad valorem taxes. The court of appeals would have us accept the rather strange notion that whenever the Constitution authorizes the Legislature to act, the courts are foreclosed from constitutional equal rights review of the product of the Legislature's actions. The Legislature created school districts in Texas, authorized them to tax, and allocated 50% of the funding of public education in Texas to ad valorem taxes generated from local tax bases. Inasmuch as "school districts are but subdivisions of the state government, organized for convenience in

exercising the governmental function of establishing and maintaining public free schools for the benefit of the people," no amount of sophistry will permit the State to avoid judicial review of its product. Lee, 24 S.W.2d at 450.

## II. THE TEXAS SYSTEM OF FUNDING PUBLIC EDUCATION DOES NOT MEET THE MANDATORY DUTY IMPOSED UPON THE LEGISLATURE BY THE TEXAS CONSTITUTION TO MAKE SUITABLE PROVISION FOR THE SUPPORT AND MAINTENANCE OF AN EFICIENT PUBLIC SCHOOL SYSTEM (Op. 13).

The court of appeals erred in refusing to determine whether the current system meets the constitutional duty imposed upon the Legislature to "establish and make suitable provision for the support and maintenance of an efficient system of public free schools." Tex. Const. Art. VII, §1. "Suitable" and "efficient" are words with meaning; they represent standards which the Legislature must meet in providing a system of public free schools. If the system falls below that standard -- if it is inefficient or not suitable -- then the Legislature has not discharged its constitutional duty and the system should be declared unconstitutional. Courts are competent to make this inquiry. The findings of the trial court, and the conclusions reached in every serious study of Texas education, reveal the gross inefficiency and inequity of the current Texas school finance system.

## III. THE TEXAS SYSTEM OF FUNDING PUBLIC EDUCATION VIOLATES THE DUE COURSE OF LAW PROVISION OF THE TEXAS CONSTITUTION (Op. 15).

State officials have thrust increasingly heavy financial burdens upon local school districts. Wealthy districts have little trouble

meeting these obligations; but for poorer districts, such state-imposed mandates have required substantial increases in property tax rates. The disproportionate burdens imposed upon poorer districts constitute deprivations of property without due course of law, in violation of Article I, Section 19 of the Texas Constitution. In addition, the disparate burdens imposed by the State fly in the face of the constitutional mandate that taxation "shall be equal and uniform." Tex.Const. Art. VIII,§1.

## CONCLUSION AND PRAYER FOR RELIEF

The trial court correctly concluded of the Texas system of funding public education: "The wealth disparities among school districts in Texas are extreme, and given the heavy reliance placed upon local property taxes in the funding of Texas public education,. these disparities in property wealth among school districts result in extreme and intolerable disparities in the amounts expended for education between wealthy and poor districts with the result that children in the property poor school districts suffer a denial of equal educational opportunity." (Tr. 592). For the reasons stated in this Brief, the undersigned amicus curiae request that this Court reverse the judgement of the court of appeals and affirm the judgement of the trial court. We must no longer tolerate an educational system that perpetuates such inequity.

Respectfully submitted,

Ricardo Elementary School
McAllen I.S.D.
McAllen, Texas

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Amicus Brief in Support of Petitioners' and Petitioner-Intervenors' Applications for Writ of Error has been sent on this 12th day of May, 1989, by United States Mail, postage prepaid to all counsel of record.

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# AMICUS CURIAE BRIEF OF LAND COMMISSIONER GARRY MAURO

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GARRY MAURO, COMMISSIONER
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Austin, Texas 78701-1495

NO. C-8353

IN THE

SUPREME COURT OF TEXAS

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EDGEWOOD INDEPENDENT SCHOOL DISTRICT, et al.,

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# AMICUS CURIAE BRIEF OF LAND COMMISSIONER GARRY MAURO

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V.

WILLIAM N. KIRBY, ET AL.

Respondents

AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS

TO THE HONORABLE SUPREME COURT OF THE STATE OF TEXAS:

Comes now, Garry Mauro, Commissioner of the General Land Office and Trustee of the Permanent School Fund, who submits this Amicus Curiae brief, pro se, in support of Petitioners' Application for Writ of Error.

Texas' commitment to education is unquestioned. From the days when we were part of Mexico to the present, our constitution, laws and policies have reflected the significance Texans have attached to education. There have been disparities, however, in the educational opportunities afforded the school children of Texas. Over the years, this deficiency has been recognized and remedial action has been taken, especially with the legislature's recent reforms. Nonetheless, as the trial court's undisputed findings of fact show, and recent data on current education expenditures reveal, these disparities continue, often at vast and intolerable levels.

In 1987-88, the average per-student expenditure of both state and local funds was $3,117. However, Laureless Independent School District in Kleberg County had resources more than six times that amount, or $19,875 per student. On the other hand, Killeen Independent School District in Bell County had state and local tax resources, combined with federal impact aid in lieu of property taxes, of only $2,575 per student -- significantly below the state average. Analysis, Texas Research League, Volume 10, Number 1, January, 1989. This disparity, and others too numerous to mention here, flies in the face of previous legislative efforts to provide a "thorough and efficient system" of public school finance that affords each of our children access to educational programs and services that are "substantially equal."

The time has come to remedy these inequities once and for all. Accordingly, Amicus urges this Court to grant petitioners' Application for Writ of Error and to reinstate the judgment of the trial court.

No one disputes the significance of education. It impacts on nearly every facet of an individual's life. Education "... has a fundamental role in maintaining the fabric of our society." Plyler v. Doe, 457 U.S. 202, 221 (1982). While it is unnecessary to expound on the virtues and necessity of education, the U.S. Supreme Court in Brown v. Board of Education, 347 U.S. 483, 493 (1954), provides a cogent summary of its importance, stating that

> ... [education] is required in the performance of our most basic public responsibilities.... It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

In the present case the Court of Appeals recognized the importance of education and the fact that it "... has long commanded a central role in the affairs of this state." (Op. p.4). The court held, however, that the relative importance of an issue does not confer it with fundamental right status, citing San Antonio I.S.D. v. Rodriguez, 411 U.S. 1 (1973). In Rodriguez, the U.S. Supreme Court held that education, though of vital importance, was not a fundamental right under the federal constitution. However, as Justice Gammage points out in his dissenting opinion, the majority's reliance on Rodriguez is misplaced insofar as that case was decided under the federal, rather than state constitution.

Fundamental rights are also rooted in state constitutions. The Supreme Court, in Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81 (1980), held that a state may exercise powers "...to adopt in its own constitution liberties more expansive than those created by the Federal Constitution." States are free to read their own constitutions more broadly than the Supreme Court reads

the federal constitution. City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 (1982). As stated by the Connecticut Supreme Court in Horton v. Meskill, 376 A.2d 359, 371 (Conn. 1977), U.S. Supreme Court decisions defining fundamental rights are to be followed "... only when they provide no less individual protection than is guaranteed by [state] law."

This Court has voiced adherence to this credo, stating in Lucas v. U.S., 757 S.W.2d 687, 692 (Tex. 1988),

> The federal constitution sets the floor for individual rights; state constitutions set the ceiling. Recently state courts have not hesitated to look to their own constitutions to protect individual rights. [citations omitted]. This Court has been in the mainstream of that movement ...
>
> Our constitution has independent vitality, and this Court has the power and duty to protect the additional state guaranteed rights. (emphasis added).

See also: Whitworth v. Bynum, 699 S.W.2d 194, 196 (Tex. 1985).

This Court has also stated that "... the individual rights guaranteed in the present constitution reflect Texas' values, customs and traditions." LeCroy v. Hanlon, 713 S.W.2d 335, 339 (Tex. 1985). Amicus submits that the constitution, laws and history of this state reveal that education is indeed a fundamental right that mirrors these longstanding values and traditions.

Texas' commitment to education arose even before statehood. The Mexican government's failure to provide for education was listed among the grievances in the Texas Declaration of

Independence. The fact that this failure was listed along with such fundamental rights as freedom of religion, trial by jury and the right to bear arms shows the importance attached to education. The gravamen of the complaint was that the Mexican government had

> ... failed to establish any public system of education, although possessed of almost boundless resources, (the public domain,) and although it is an axiom in political science, that unless people are educated and enlightened, it is idle to expect the continuance of civil liberty, or the capacity for self government.

The Declaration of Independence para. 9 (Tex. 1836).

The Constitution of the Republic of Texas, adopted in 1836, embodied this commitment to education in providing that "[i]t shall be the duty of Congress, as soon as circumstances will permit, to provide by law a general system of education." Tex. Const. gen. prov., §5 (1836).

In 1838 President Mirabeau Lamar exhorted the Congress of the Republic of Texas to act in providing for education. He stated:

> If we desire to establish a Republican Government on a broad and permanent basis, it will become our duty to adopt a comprehensive and well regulated system of mental and moral culture. It is admitted by all, that [a] cultivated mind is the guardian genius of Democracy, ... the noblest attribute of man. It is the only dictator that free men acknowledge, and the only security which free men desire. The influence of Education in the moral world, is like light in the physical; rendering luminous, what before was obscure. It opens a wide field for the exercise and improvement of all the faculties of man, and imparts vigor and

> clearness to those important truths in the science of Government, as well as of morals, which would otherwise be lost in the darkness of ignorance.

Address by President Mirabeau B. Lamar to Congress (December 21, 1838).

Heeding Lamar's visionary words, in 1839 the Republic enacted a law providing that three leagues of public domain should be surveyed and set apart in each county for the purpose of establishing a school system. 2 H. Gammel, Laws of Texas, 134-136 (1839). In 1840 this was increased to four leagues per county. Id. at 320-322 (1840).

The first constitution of the State of Texas reflected the state's commitment to education:

> A general diffusion of knowledge being essential to the preservation of the rights and liberties of the people, it shall be the duty of the legislature of this State to make suitable provision for the support and maintenance of public schools.

Tex. Const. art. X, §1 (1845).

The current constitution, art. VII, §1, expresses the state's commitment to education in substantially the same language.

The 1845 constitution also provided that all public lands granted for public schools could not be alienated and that counties that had not received school lands were entitled to the same amount of land previously appropriated by the Republic to other counties. Tex. Const. art. X, §§3 and 4, (1845).

The Constitution of 1866, in art. X, §§2 and 3, established the perpetual school fund, setting aside certain public lands to establish a permanent source of income to support the school system. The Constitution of 1876, in art. VII §2, dedicated one-half of the remaining unreserved portion of the public domain to the perpetual school fund. These public lands have been administered under the aegis of the General Land Office so as to maximize revenues available for education.

In 1948 the Texas legislature recognized that the state's constitutional commitment to education was not being fulfilled. In establishing the Gilmer-Aiken Study Commission to address this problem, it was stated,

> WHEREAS, Leading educators and educational authorities, both in and outside the teaching profession, agree that the educational inequalities, above mentioned, are increasing rather than decreasing, so that in spite of the foresight and evident intentions of the founders of our State and the framers of our State Constitution to provide equal education advantages for all, Texas continues to lag farther and farther behind educationally ...

Tex. H.R. Con. Res. 48, 50th Leg. 1947 Tex. Gen. Laws 1135.

In 1975 this policy was reiterated by the legislature in §16.001 of the Education Code, where it is stated,

> It is the policy of the State of Texas that the provision of public education is a State responsibility and that a thorough and efficient system be provided and substantially financed through state revenue sources so that each student enrolled in the public school system shall have access to programs and services that are appropriate to his or her

> educational needs and that are substantially equal to those available to any other similar student, notwithstanding varying local economic factors.

Tex. Educ. Code Ann. §16.001 (Vernon Supp. 1989).

Texas' commitment to education, since the days of the Republic, is clear. The Court of Appeals, however, minimizes this commitment and holds that education is not a fundamental right. Amicus submits that the express language of the Texas Constitution and the history of our state contradict this holding.

In determining whether a fundamental right exists, this Court has held that, "[f]undamental rights have their genesis in the express and implied protections of personal liberty recognized in federal and state constitutions." Spring Branch ISD v. Stamos, 695 S.W.2d 556 (Tex. 1985).

The federal approach is similar. In Rodriguez the U.S. Supreme Court stated that "... the key to discovering whether education is 'fundamental' ... lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution." 411 U.S. at 34.

The Texas Constitution states that education is "essential to the preservation of the liberties and rights of the people." It is this express recognition of education as being the foundation of freedom and democracy that elevates it to fundamental right status.

The Court of Appeals makes short shrift of these words which have been part of our constitution since statehood. Rather, it points to other sections of the constitution that provide for mechanic's liens, county poor houses and the like, none of which are fundamental rights. The comparison is specious. The fact that such matters are constitutionally provided for does not put them on an equal footing with education. As pointed out by Justice Gammage in his dissent, "... the opinion fails to observe that none of these matters is perceived, as is education, as 'being essential to the preservation of the liberties and rights of the people,' nor are they couched in constitutional language lending itself to such treatment." (Dis. Op. pp. 5-6).

The decisions of other states' courts are illuminative on the issue of education as a fundamental right. A number of these constitutions contain language similar to the provision of art. VII, §1 requiring the legislature to establish "an efficient system of public education."

In Pauley v. Kelly, 255 S.E.2d 859, 878 (W.Va. 1979) the West Virginia Supreme Court stated:

> Certainly, the mandatory requirement of 'a thorough and efficient system of free schools' found in Article XII, Section 1 of our Constitution demonstrates that education is a fundamental right in this State.

In Washakie County School District No. One v. Herschler, 606 P.2d 310 (Wyo. 1980) the Wyoming Supreme Court held that the constitutional provision mandating establishment of a public

school system left "... no room for any conclusion but that education for the children of Wyoming is a matter of fundamental interest." Id. at 333.

In Horton v. Meskill, 376 A.2d 359 (Conn. 1977) the result was similar. Focusing on the mandatory nature of the constitutional provision establishing a public school system, the Connecticut Supreme Court found education to be a fundamental right. That court also placed a great deal of emphasis on Connecticut's historical commitment to education stemming from colonial times.

These decisions serve as guidelines in determining that education is a fundamental right under the Texas Constitution. As in the constitutions of Wyoming, Connecticut and West Virginia, the Texas Constitution makes establishment of an educational system a mandatory duty of the legislature. Similarly, as in those states, our constitution contains an equal protection provision. As seen in Pauley, Herschler and Horton, the fundamental right status of education has been based on these provisions alone. The Texas Constitution presents an even more compelling case for making such a determination. The express recognition of the essential nature of education and its nexus to other rights and liberties makes clear that education is indeed a fundamental right under the Texas Constitution.

## Conclusion

Texas' commitment to education, rooted in our Declaration of Independence itself, is unquestioned. It has been embodied in our constitution and laws for over 150 years. Despite our historical commitment, however, we have fallen short. Most telling in this regard are the trial court's findings that over 1/3 of Texas students receive inadequate educations and that this is directly attributable to inequities in the public school finance system.

Texans can no longer tolerate substandard and inequitable educational opportunities. We can no longer afford to occasion access to these opportunities on the vagaries of geographic and demographic factors.

The words of our constitution and the Texas Declaration of Independence ring truer and clearer today than at any time in our history: liberty and democracy are dependent upon education; education is essential to the preservation of our freedom. Amicus respectfully urges this Court to reaffirm and give renewed vitality to the principles on which this state was founded by declaring education to be a fundamental right and reinstating the judgment of the trial court.

Respectfully submitted,

GARRY MAURO, Commissioner
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AMICUS CURIAE, Pro Se

## CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on the 28th day of February, 1989, the foregoing was served by first-class, certified mail, return receipt requested, postage prepaid, to each group of counsel of record.

Garry Mauro

GARRY MAURO

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# AMICUS CURIAE BRIEF OF THE TEXAS FEDERATION OF TEACHERS, AFL-CIO IN SUPPORT OF PETITIONERS' APPLICATION FOR WRIT OF ERROR

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Attorneys for Amicus Curiae
Texas Federation of Teachers

NO. C-8353

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IN THE

SUPREME COURT OF TEXAS

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EDGEWOOD INDEPENDENT SCHOOL DISTRICT, et al.,

Petitioners,

v.

WILLIAM KIRBY, et al.,

Respondents.

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# AMICUS CURIAE BRIEF OF THE TEXAS FEDERATION OF TEACHERS, AFL-CIO IN SUPPORT OF PETITIONERS' APPLICATION FOR WRIT OF ERROR

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Texas Federation of Teachers

## CERTIFICATE OF THE PARTIES

The parties to this case are:

William N. Kirby, State Commissioner of Education, Respondents
Texas State Board of Education, Respondents
Bill Clements, Governor and Chief Executive Officer of the State of Texas, Respondents
Robert Bullock, State Comptroller of Public Accountants, Respondents
State of Texas, Respondents
Jim Mattox, Attorney General of Texas, Respondents
Andrews Independent School District, Respondents
Arlington Independent School District, Respondents
Austwell Tivoli Independent School District, Respondents
Beckville Independent School District, Respondents
Carrollton-Farmers Branch Independent School District, Respondents
Carthage Independent School District, Respondents
Cleburne Independent School District, Respondents
Coppell Independent School District, Respondents
Crowley Independent School District, , Respondents
DeSoto Independent School District, Respondents
Duncanville Independent School District, Respondents
Eagle Mountain-Saginaw Independent School District, Respondents
Earnes Independent School District, Respondents
Eustace Independent School District, Respondents
Glasscock County Independent School District, Respondents
Grady Independent School District, Respondents
Grand Prairie Independent School District, Respondents
Grapevine-Colleyville Independent School District, Respondents
Hardin Jefferson Independent School District, Respondents
Hawkins Independent School District, Respondents
Highland Park Independent School District, Respondents
Hurst Euless Bedford Independent School District, Respondents
Iraan-Sheffield Independent School District, Respondents
Irvin Independent School District, Respondents

Klondike Independent School District, Respondents
Lago Vista Independent School District, Respondents
Lake Travis Independent School District, Respondents
Lancaster Independent School District, Respondents
Longview Independent School District, Respondents
Mansfield Independent School District, Respondents
McMullen Independent School District, Respondents
Miami Independent School District, Respondents
Midway Independent School District, Respondents
Mirando City Independent School District, Respondents
Northwest Independent School District, Respondents
Pinetree Independent School District, Respondents
Plano Independent School District, Respondents
Prosper Independent School District, Respondents
Quitman Independent School District, Respondents
Rains Independent School District, Respondents
Rankin Independent School District, Respondents
Richardson Independent School District, Respondents
Riviera Independent School District, Respondents
Rockdale Independent School District, Respondents
Sheldon Independent School District, Respondents
Stanton Independent School District, Respondents
Sunnyvale Independent School District, Respondents
Willis Independent School District, Respondents
Wink-Loving Independent School District, Respondents
Edgewood Independent School District, Petitioners
Socorro Independent School District, Petitioners
Eagle Pass Independent School District, Petitioners
Brownsville Independent School District, Petitioners
San Elizario Independent School District, Petitioners
San Antonio Independent School District, Petitioners
Pharr-San Juan-Alamo Independent School District, Petitioners
Kenedy Independent School District, Petitioners
La Vega Independent School District, Petitioners
Milano Independent School District, Petitioners
Harlandale Independent School District, Petitioners
North Forest Independent School District, Petitioners
Laredo Independent School District, Petitioners
Aniceto Alonzo, on his own behalf and as next friend of his children Santos Alonzo, Hermelinda Alonzo, and Jesus Alonzo, Petitioners
Shirley Anderson, on her own behalf and as next friend of her child Derrick Price, Petitioners
Juanita Arredondo, on her behalf and as next friend of her children Agustin Arredondo, Jr., Nora Arredondo and Sylvia Arredondo, Petitioners
Mary Cantu, on her own behalf and as next friend of her children Jose Cantu, Jesus Cantu and Tonitus Cantu, Petitioners

Josefina Castillo, on her own behalf and as next friend of her child Maria Coreno, Petitioners
Eva W. Delgado, on her own behalf and as next friend of her child Omar Delgado, Petitioners
Ramona Diaz, on her own behalf and as next friend of her children Manuel Diaz and Norma Diaz, Petitioners
Anita Gandara and Jose Gandara, Jr., on their own behalf and as next friends of their children Lorraine Gandara and Jose Gandara, III, Petitioners
Nicolas Garcia, on his own behalf and as next friend of his children Nicolas Garcia, Jr., Rodolfo Garcia and Rolando Garcia, Graciel Garcia, Criselda Garcia and Rigoberto Garcia, Petitioners
Raquel Garcia, on her own behalf and as next friend of her children Frank Garcia, Jr., Roberto Garcia, Roxanne Garcia and Rene Garcia, Petitioners
Hermelinda C. Gonzalez, on her own behalf and as next friend of her children, Angelica Maria Gonzalez, Petitioners
Ricardo Molina, on his own behalf and as next friend of his child Job Fernando Molina, Petitioners
Opal Mayo, on her own behalf and as next friend of her children John Mayo, Scott Mayo and Rebecca Mayo, Petitioners
Hilda Ortiz, on her own behalf and as next friend of her child Juan Gabriel Ortiz, Petitioners
Rudy C. Ortiz, on his own behalf and as next friend of his children Michelle Ortiz, Eric Ortiz and Elizabeth Ortiz, Petitioners
Estela Padilla and Carlos Padilla, on their own behalf and as next friends of their children Gabriel Padilla, Petitioners

Adolfo Patino, on his own behalf and as next friend of his child Adolfo Patino, Jr., Petitioners
Antonia Y. Pina, on his own behalf and as next friend of his children Antonio Pina, Jr., Alma Pina and Anna Pina, Petitioners
Reymundo Perez, on his own behalf and as next friend of his children Ruben Perez, Reymundo Perez, Jr., Monica Perez, Raul Perez, Rogelio Perez and Ricardo Perez, Petitioners
Patricia A. Priest, on her own behalf and as next friend of her children Alvin Priest, Stanley Priest, Carolyn Priest and Marsha Priest, Petitioners
Demetrio Rodriguez, on his own behalf and as next friend of his children Patricia Rodriguez and James Rodriguez, Petitioners
Lorenzo G. Solis, on his own behalf and as next friend of his children Javier Solis and Cynthia Solis, Petitioners

Jose A. Villalon, on his own behalf and as next friend of his children, Ruben Villalon, Rene Villalon, Maria Christina Villalon and Jaime Villalon, Petitioners
Alvarado Independent School District, Petitioners
Blanket Independent School District, Petitioners
Burleson Independent School District, Petitioners
Canutillo Independent School District, Petitioners
Chilton Independent School District, Petitioners
Copperas Cove Independent School District, Petitioners
Covington Independent School District, Petitioners
Crawford Independent School District, Petitioners
Crystal City Independent School District, Petitioners
Early Independent School District, Petitioners
Edcouch-Elsa Independent School District, Petitioners
Evant Independent School District, Petitioners
Fabens Independent School District, Petitioners
Farwell Independent School District, Petitioners
Godley Independent School District, Petitioners
Goldthwaite Independent School District, Petitioners
Grandview Independent School District, Petitioners
Hico Independent School District, Petitioners
Jim Hogg County Independent School District, Petitioners
Hutto Independent School District, Petitioners
Jarrell Independent School District, Petitioners
Jonesboro Independent School District, Petitioners
Karnes City Independent School District, Petitioners
La Feria Independent School District, Petitioners
La Joya Independent School District, Petitioners
Lampasas Independent School District, Petitioners
Lasara Independent School District, Petitioners
Lockhart Independent School District, Petitioners
Los Fresnos Independent School District, Petitioners
Lyford Independent School District, Petitioners
Lytle Independent School District, Petitioners
Mart Independent School District, Petitioners
Mercedes Independent School District, Petitioners
Meridian Independent School District, Petitioners
Mission Independent School District, Petitioners
Navasota Independent School District, Petitioners
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Roma Independent School District, Petitioners
Rosebud-Lott Independent School District, Petitioners
San Antonio Independent School District, Petitioners
San Saba Independent School District, Petitioners
Santa Maria Independent School District, Petitioners
Santa Rosa Independent School District, Petitioners
Shallowater Independent School District, Petitioners
Southside Independent School District, Petitioners
Star Independent School District, Petitioners
Stockdale Independent School District, Petitioners
Trenton Independent School District, Petitioners
Venus Independent School District, Petitioners
Weatherford Independent School District, Petitioners
Ysleta Independent School District, Petitioners
Connie DeMarse, on her own behalf and as next friend of her children Bill DeMarse and Chad DeMarse, Petitioners
B. Halbert, on his own behalf and as next friend of his child, Elizabeth Halbert, Petitioners
Libby Lancaster, on her own behalf and as next friend of her children, Clint Lancaster, Lyndsey Lancaster, and Britt Lancaster, Petitioners
Judy Robinson, on her own behalf and as next friend of her child, Jena Cunningham, Petitioners
Frances Rodriguez, on her own behalf and as next friends of her children Ricardo Rodriguez and Raul Rodriguez, Petitioners
Alice Salas, on her own behalf and as next friend of her child, Aimee Salas, Petitioners

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NO. C-8353

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IN THE

SUPREME COURT OF TEXAS

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EDGEWOOD INDEPENDENT SCHOOL DISTRICT, et al.,

Petitioners,

v.

WILLIAM KIRBY, et al.,

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# AMICUS CURIAE BRIEF OF THE TEXAS FEDERATION OF TEACHERS, AFL-CIO IN SUPPORT OF PETITIONERS' APPLICATION FOR WRIT OF ERROR

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## STATEMENT OF INTEREST

The Texas Federation of Teachers is a non-profit labor organization representing 15,000 educational employees throughout the State of Texas. As a representative of all educational workers in Texas, the Texas Federation of Teachers is committed to and interested in safeguarding and improving the quality of education in Texas. To that end, the Texas Federation of Teachers has participated extensively in the Texas School Finance

Symposium and the School Finance Working Group because the Federation recognizes that adequate and equitable funding for education is absolutely central to quality education in Texas. The instant case raises an issue of paramount importance to the Texas Federation of Teachers: is education a fundamental right under the Texas Constitution to which the children of Texas are entitled regardless of the wealth of their local school district.

## STATEMENT OF THE CASE

The Texas Federation of Teachers concurs in and adopts the statement of the case by Petitioners Edgewood Independent School District, et al. and Petitioners-Intervenors, Alvarado Independent School District, et. al., in their Applications For Writ of Error.

## STATEMENT OF JURISDICTION

The Texas Federation of Teachers adopts the Statement of Jurisdiction of Petitioners-Intervenors, Alvarado Independent School District, et. al., in their Application For Writ of Error.

## POINT OF ERROR

The Court of Appeals erred in holding that the denial of equal educational opportunity does not violate a fundamental right under the Texas Constitution. (Court of Appeals' Opinion, pp. 3-8).

## BRIEF OF THE ARGUMENT

The Texas Federation of Teachers submits this Amicus Curiae brief in support of the Petitioners' claim that education is a fundamental right which the Texas Constitution guarantees to the citizens of this State. In concluding that, "education, although vital, does not rise to the same level as ... rights which have long been recognized as fundamental..." (Opinion, p. 7), the Court of Appeals ignored the explicit language of the Texas Constitution, the meaning given that language by the Texas legislature and courts, and the significant differences between the Texas and U.S. Constitutions -- differences which have been recognized by both this Court and the U.S. Supreme Court.

Both the Petitioners' briefs in this cause and the dissenting opinion below emphasize the explicit, affirmative statement in the Texas Constitution that education is

"...essential to the preservation of the liberties and rights of the people..." Tex. Const. Art. VII, Section 1. They further point out that the Constitution does not simply declare the importance of education, it goes further to mandate the legislature to provide an efficient public school system. This language is emphasized because it represents an express intention in our Constitution that education is an essential right which the State is affirmatively obligated to provide.

The Court of Appeals reasoned that education cannot be a fundamental right because it is a right which requires public financial support and affirmative governmental action to insure that all persons have the means to enjoy it. The Court concluded that rights can be "fundamental rights" in the technical sense only when there is no implied affirmative obligation of government to provide the right. (Opinion pp. 6-7). This analysis ignores the explicit language in Article VII, Section 1 of the Texas Constitution which specifically imposes an affirmative obligation on state government to provide suitable education for all citizens. This Court does not have to imply an affirmative obligation to provide for education -- an actual obligation already exists. The dissenting opinion below correctly recognized the centrality which this constitutionally-mandated obligation has to the analysis of whether education is a fundamental right: the Constitution's declaration of the essential nature of education

in conjunction with its mandate to provide education to the citizenry reveals a clear intent that education is a fundamental right, unlike others referred to in the Constitution.

The intent of this Constitutional language has been recognized by both the Texas legislature and the Courts. In 1948, when the Texas legislature created the Gilmer-Aiken Study Commission to analyze public education in Texas, they specifically acknowledged the Constitutional intent with regard to education:

> WHEREAS, Leading educators and educational authorities, both in and outside the teaching profession, agree that the educational inequalities, above mentioned, are increasing rather than decreasing, so that in spite of the foresight and evident intentions of the founders of our State and the framers of our State Constitution to provide equal educational advantages for all, Texas continues to lag farther and farther behind educationally; and ...

Tex. H.C. Res. 48, 50th Leg. (1948).

Again, in 1977, the legislature recognized the State's affirmative obligation to provide a substantially equal education to all citizens:

> It is the policy of the State of Texas that the provision of public education is a State responsibility and that a thorough and efficient system be provided and substantially financed through state revenue sources so that each student enrolled in the public school system shall have access to programs and services that are appropriate to his or her educational

> needs and that are substantially equal to those available to any other similar student, notwithstanding varying local economic factors. (emphasis added)

Texas Education Code, Section 16.001.

In 1987, the Dallas Court of Appeals, relying on Article VII of the Texas Constitution, held that, "Public education is a fundamental right guaranteed by the Texas Constitution." Stout v. Grand Prairie Independent School District, 733 S.W.2d 290, 294 (Tex. App. - Dallas 1987, writ ref'd n.r.e.). In Stout, the Court considered the constitutionality of Section 21.912 of the Education Code which, as interpreted by this Court, provides immunity for professional school employees in all circumstances except when, in disciplining students, an employee uses excessive force or is negligent. Hopkins v. Spring Independent School District, 736 S.W.2d 617 (Tex. 1987). Because Section 21.912 effectively abrogates a litigant's right to redress and impinges on constitutionally guaranteed rights to due process and open courts, the Court analyzed the legislative purpose of Section 21.912 to see if it was compelling and not simply legitimate. The Court concluded that the statute's purpose -- to insure the quality and availability of public education -- was compelling precisely because education is a fundamental right. The Stout decision, like the dissent below, recognizes the significance of the Texas Constitution's treatment of education in Article VII.

Despite the obvious difference between the Texas Constitution, with its explicit reference to both the importance of education and the State's obligation to provide for it, and the U.S. Constitution, with no provision at all for education, the Court of Appeals improperly relied on the U.S. Supreme Court's holding and analysis in San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) to conclude that education is not a fundamental right under the Texas Constitution. The Petitioners-Intervenors', Alvarado Independent School District, et. al., Application for Writ of Error argues that the Court of Appeals' almost exclusive reliance on Federal Constitutional analysis is particularly inappropriate here given the nature of the right at issue -- education -- and its particular designation as a right more closely identified with state and local, rather than with federal government. (Petitioners-Intervenors' Application, pp. 20-22).

In addition to this very important point, Amicus Texas Federation of Teachers also urges this Court, in keeping with recent judicial trends, to analyze and interpret our Texas Constitution independently of the Federal Constitution. In Whitworth v. Bynum, 699 S.W.2d 194 (Tex. 1985), this Court addressed the interaction between Federal and State constitutional analysis:

> Subject to adhering to minimal federal standards, we are at liberty to interpret

> state statutes in light of our own tests to determine a statute's constitutionality... This is particularly true when a state court is acting within a subject area uniquely appropriate for a state's judiciary, such as the common law.
>
> 619 S.W.2d at 196.

As in Whitworth, the subject area at issue here -- education -- is also uniquely appropriate for state involvement. (See, Petitioners-Intervenors' Application, pp. 20-22).

The United States Supreme Court has also commented on the right of a state court to independently interpret its state constitution. In City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 (1982), the Supreme Court considered constitutional challenges to two (2) sections of a licensing ordinance governing coin-operated amusement establishments in Mesquite, Texas. The Court of Appeals for the Fifth Circuit found both sections unconstitutional -- one (1) on the grounds that it violated both the U.S. and Texas constitutional guarantees of due process and equal protection. In discussing its own limited jurisdiction to review interpretations of state law, the Supreme Court said:

> It is first noteworthy that the language of the Texas constitutional provision [equal protection] is different from, and arguably significantly broader than, the language of the corresponding federal provisions. As a number of recent State Supreme Court decisions demonstrate, a state court is entirely free to read its own State's constitution more broadly than this Court reads the Federal Constitution, or to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee. (emphasis added).
>
> 455 U.S. at 295.

This language highlights the significant distinctions between the text of the U.S. and Texas constitutions -- distinctions which the Court of Appeals ignored.

The important differences between our Texas Constitution and the U.S. Constitution were also recognized in Jones v. Memorial Hospital System, 746 S.W.2d 891 (Tex. App. - Houston [1st Dist.] 1988, no writ history) when the Houston Court of Appeals relied on the textual differences between the free speech provisions of the two Constitutions to conclude that:

> Because we are concerned with the affirmative provisions of the Texas Constitution, rather than the first amendment freedoms of the federal constitution, we are not restricted to the same tests used by the federal courts. [citation omitted]. We may, therefore, adopt a test that requires a lower threshold of public activity. [citation omitted].
>
> 746 S.W.2d at 895.

In Jones, the court emphasized an important distinction between the free speech guarantee of the Texas Constitution and that of the federal constitution: the Texas Constitution affirmatively grants, in positive terms, a right to free speech; while, the federal constitution expresses free speech freedoms in negative terms, only restricting governmental interference with those freedoms. 746 S.W.2d at 893. It was this distinction which led the Court to adopt a more expansive analysis than that used by the federal courts in free speech cases.

The distinction between the Texas and U.S. Constitutions relied on in Jones is also present in this case: the Texas Constitution affirmatively grants the right to education, while the U.S. Constitution does not. This distinction should lead this Court to conclude, as the Court of Appeals did in Jones, that although Texas' school finance system may be constitutional under federal law, it is not constitutional under State law given the affirmative guarantees of our constitution.

The dissenting opinion is correct in its reasoning that education is a fundamental right under the Texas Constitution. As such, "strict scrutiny" analysis mandates a finding that the current system of school financing and its resulting disparities between wealthy and poor school districts violate the Texas Constitution.

## CONCLUSION AND PRAYER FOR RELIEF

In conclusion, the language of the Texas Constitution, as well as the meaning given that language by the Texas legislature and courts, demonstrate that education is a fundamental right guaranteed by the Texas Constitution. To hold otherwise is to ignore the explicit mandates of the Texas Constitution. For these reasons, Amicus Curiae Texas Federation of Teachers respectfully requests that this court hold that education is a

fundamental right in Texas, reverse the judgment of the Court of Appeals, and reinstate the judgment of the trial court on the merits of this cause.

Respectfully submitted,

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Attorneys for Amicus Curiae

Certificate of Service

By my signature, I certify that a true and correct copy of the above and foregoing instrument was served upon all counsel of record in this cause, by U.S. First Class Mail, on this 17th day of February, 1989.

Lynn Rubinett

Lynn Rubinett

93-3820

No. C-8353



IN THE

SUPREME COURT OF TEXAS

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EDGEWOOD INDEPENDENT SCHOOL DISTRICT, et al.,

Petitioners

V.

WILLIAM KIRBY, ET AL.,

Respondents

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# BREIF OF AMICUS CURIAE OF LAREDO CHAMBER OF COMMERCE IN SUPPORT OF PETITIONERS AND PETITIONERS-INTERVENORS' APPLICATIONS FOR WRIT OF ERROR

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Laredo Chamber of Commerce

No. C-8353

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IN THE

SUPREME COURT OF TEXAS

---

EDGEWOOD INDEPENDENT SCHOOL DISTRICT, et al.,

Petitioners

V.

WILLIAM KIRBY, ET AL.,

---

Brief of Amicus Curiae of Laredo Chamber of Commerce
In Support of Petitioners and Petitioners Intervenors'
Applications for Writ of Error

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TO THE SUPREME COURT OF TEXAS:

Amicus Curiae, LAREDO CHAMBER OF COMMERCE, files this Brief in support of the application for Writ of Error filed by Petitioners, Edgewood Independent School District, et al., and Petitioner-Intervenors, Alvarado Independent School District, et al.

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## Statement of Interest and Summary of Argument

The city of Laredo is one of the oldest and most historic cities in the state of Texas. Historically, the city's economic growth has been intertwined with Mexican economy of its sister city, Nuevo Laredo, Tamps . Laredo has struggled to survive the devastating economic effects of the drastic devaluations of the Mexican peso in the late seventies and early eighties. During this time our border community has seen its real estate values drop and its taxes increase. Laredo has worked feverishly to bring industry and commerce to the border area. It has seen its school districts struggle to meet the demands of the increasing influx of new immigrants from Mexico. The Chamber of Commerce is committed to the ideal that equal education is a fundamental right of every Texas child.

Laredo has done its share to generate revenue for the state. It is the leading point of entry to Mexico and generates and generates revenue from the state in the tourist, oilfield and import-export industries. The chamber recognizes that there are other pressing financial needs for the state to consider when allocating resources. But we strongly feel that education is linked to all those other constitutional rights that are necessary for participation in the growth and development of our society.

The Laredo Chamber of Commerce has 700 members. It represents all the major banking, trade, industrial, commercial and entrepreneurial businesses in Laredo and surrounding areas. The chamber is involved in the total fabric of society in Laredo and Webb County and maintains close relationships with similar interests in both Mexico and throughtout Texas. Laredo has continuously maintained educational institutions since the Eighteenth Century. We know well both the importance of education and the effect of a school finance system on the quality of education in our area.

The critical importance of education is without question. While it is unnecessary to expound at length on this truism, the U.S. Supreme Court in Brown v. Board of Education, 347 U.S. 483, 493 (1954) does provide a focused summary of the importance of education.

> "Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life is he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."

In short, education is an indispensable element for the preservation of democracy.

This nexus between education and democracy is evident throughout the history of our state. The Texas Declaration of Independence, in listing the grievances against the Mexican government, attached profound significance to the need for education. The Declaration stated,

> "It (Mexico) has failed to establish any public system of education, although possessed of almost boundless resources, the public domain, and although it is an axiom in political science, that unless people are educated and enlightened, it is idle to expect the continuance of civil liberty, or the capacity for self government. "

**The Declaration of Independence para. 9 (Tex. 1836).**

The Constitution of the Republic of Texas, adopted in 1836, embodied this commitment to education in providing that "It shall be the

duty of Congress, as soon as circumstances will permit, to provide by law a general system of education." **TEX. CONST. gen. prov., 5 (1836).**

This commitment was expanded in art. 10, 1 of the first Constitution of the State of Texas, adopted in 1845, which stated,

> "A general diffusion of knowledge being essential to the preservation of the rights and liberties of the people, it shall be the duty of the Legislature of this State of make suitable provisions for the support and maintenance of public schools."

We are troubled by a public school education system which places too great an emphasis on local real estate values. This system penalizes a child for living in a "property poor" school system, such as our Laredo Independent School District(approximately $40,000 in taxable wealth per student). Other school districts, because of local property values of over $1,000.000.00 taxable wealth per student are able to tax at a lower rate and generate much more money than our school district. Education should be funded equitably. Under the current system, our school children's educational needs are tied to the unpredictable Mexican economy. Whereas that may be an acceptable business reality, it is not an acceptable educational reality.

## I.
## THE TRIAL COURT CORRECTLY HELD THAT EDUCATION IS FUNDAMENTAL

The critical importance of education is universally recognized. The Texas Constitution provides, in pertinent part at art. VII, *1, that "A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature...to establish and make suitable provisions for the support and maintenance of an efficient system of public free schools." This language has long been interpreted to impose upon the state a mandatory duty to establish a state educational system. Mumme v. Marrs 120 T. 383, 40 S.W. 2d 31, 35-36 (1931)

The framers of the Texas Constitution appreciated the importance of a public and free education, as they knew that the future of the state depend-ent on the input of an educated citizenry. One grievance listed against the Mexican Government as a reason for the Texas Declaration of Independence was the "neglect of public education." TEX. CONST. art. VII, *1, interp. com-mentary. An informed electorate is necessary to support traditional aspects of a democratic society -- such as participation, communication and social mobility. Coons, Clune & Sugarman, "Educational Opportunity: A Workable Constitutional Test for State Financial Structures," 57 Cal. L. Rev. 305, 362-363 (1969). An unequal education leads to unequal job opportunities, disparate income, and handicapped ability to participate in the social, cultural and political activity of our society. San Francisco Unified School District v. Johnson, 479 P 2d 699, 679 (Cal. 1976). It has been observed that "Education is essential in maintaining free enterprise democracy -- that is preserving an individual's opportunity to compete successfully in the economic marketplace, despite a disadvantaged background. Accordingly, the public schools of the state are the bright hope for the entry of the poor and oppressed into the mainstream of American Society." Serrano v. Priest, 487 P. 2d 1241, 1259 (Cal. 1971). Indeed, the United States Supreme Court noted in Brown v. Board of Education: "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." 347 U.S. 483, 493 (1954).

As recent as 1975, the Texas Legislature reiterated the importance of education when it declared:

> It is the policy of the State of Texas that the provision of public education is a state responsibility and that a through and efficient system be provided and substantially financed through state revenue sources so that each student enrolled in the public school system shall have access to programs and services that are appropriate to his or her educational needs and that are substantially equal to these available to any similar student, notwithstanding varying local economic factors. TEX. EDUC. CODE 16.001, as amended.

Consequently, the district court's finding that education is fundamental is rooted in the Texas Constitution, state statutes, and an abundance of case law. Moreover, the lack of an educated citizenry poses such peril to our democracy that the survival of state government is contingent upon it.

## II.
## THE TRIAL COURT CORRECTLY HELD THAT THE PRESENT METHOD OF FUNDING TEXAS PUBLIC SCHOOLS DENIED EQUAL EDUCATIONAL OPPORTUNITY AND IS UNCONSTITUTIONAL.

The state of Texas school system (the "system") has 1,063 school districts, and educates approximately 3 million students. (F.F. p.13).[1] The system is a state system funded principally by state appropriations and local ad valorem tax revenues. Id. Other funds are provided by the U.S. Government. Id. Currently, about forty-nine percent (49%) of school funding is provided locally through ad valorem taxes. Id.

The present system of funding public schools has created two classes of public schools: a wealthy class that imposes slight tax burdens on local property owners and provides a superior education; and another class of poor schools that must impose a much higher tax burden on local property owners and provides an inferior, and unacceptable, level of education. Evidence of the two classes of schools is abundantly clear in every facet of public funding, from staffing to construction.

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[1] References are to pages of the District Court's Decision.

Average annual expenditure per student. For the 1985-86 school year, the wealthiest schools in Texas spent an average of $19,333.00 per student, while the poorest school spent an average of only $2, 112.00 per student. (F.F. p. 15)

The Texas school finance system spends an average of $2,000.00 more per year on the 150,000 students (5% of total) in the state's wealthiest districts than on the 150,000 students in the state's poorest districts. (F.F. p. 16) The range of expenditures per student unit in Texas is up from $9,523.00 to $1,060.00 an unacceptable ratio of 9 to 1. (F.F. p.17) Consequently, a great disparity exists between the average expenditure per student in wealthy and poor school districts.

Discrimination exists in the tax rates and ability to raise funds at certain tax rates. Poor districts are forced to pay higher taxes than wealthier districts, e.g., the average tax rate in the wealthiest districts is $.08 lower than the average tax rate in the poorest districts. (F.F. p. 17-18) In the poorest districts taxpayers pay a tax rate of more than $.20 per $100.00 valuation to raise $100.00 per student, while the wealthiest districts can raise as much or more funds per student with tax rates of less than $.02 per $100.00 valuation. Id. The present system prevents poor school districts from providing an equal educational opportunity. Because the present funding scheme requires local school districts to raise a substantial portion of the total cost to operate its public school, each school district's funding potential is inextricably tied to local wealth. Too many of the poor districts fo not, and will not, have an adequate tax base to generate the required funds. Therefore, unless resources outside the local economy are injected, poor school districts are inescapably locked into an unending and worsening cycle of inadequate funding.

The lack of sufficient funds leaves the poor school districts unable and incapable of providing students an equal educational opportunity. Poor school districts continue to suffer in numerous ways, including: inadequate educational preparation, failure to meet state standards for maximum class size, failure to acquire full accreditation, and inability to meet the state's pre-kindergarten program requirements. (F.F. p. 25-26)

On the other hand, because of adequate funding, wealthy school districts are able to provide a variety of quality education programs, including more extensive curriculum and more co-curricular activities, enhanced educational support through additional training materials and technology, improved libraries and library pro-professionals, additional curriculum and staff development specialties and teacher aids, more extensive counseling services, special programs to combat dropouts, parenting programs to involve the family in the student's educational experience, lower pupil/ student ratios and the ability to attract and retain better teachers and administrators. (F.F. p.24)

Facilities. While some 40 of the 50 states participate in the funding of public school district facilities in some way, Texas does not. (F.F. p.26)

Local school districts must raise the money necessary for the construction and maintenance of Texas public school facilities because the Texas finance formulas do not include the costs of facilities. Id. A significantly greater portion of poor districts' than wealthy districts' tax revenues go to pay off bonds for construction. Id. Poor districts do not have the financial resources necessary to provide adequate facilities as do high wealth districts which adversely affects the educational opportunity of children in poor districts. (F.F. p.27)

Concentration of low income students in poor districts. The children of poor families are concentrated in the poorest school districts (F.F. p. 27-28) Such children have the greatest educational needs and, often, the greatest educational problems. (F.F. p.27) Poor school districts have the highest high school dropout rate. (F.F. p.29) The children of poor families highly concentrated in poor districts require the most expensive kind of educational programs. (F.F. p.27)

Historical inequities. Significant disparities between poor districts and wealthy districts have existed throughout Texas historically. Such disparities have imposed serious financial hardships on the children and taxpayers of poor districts. (F.F. p.29-30) Because the Texas school finance system has denied, and continues to deny, adequate funding for poor school districts, it has and continues to deny the children of such districts equal educational opportunity.

Such children have been, and continue to be, denied an equal opportunity to learn, master basic skills, acquire saleable skills and otherwise improve their quality of life. (F.F. p.30)

Recent improvements are encouraging but not sufficient. Although much progress has been made in recent years to improve the quality of our educational system through increased state funding and educational reforms, serious deficiencies persist. At the core of the problem is a compelling need to change a system that places too much reliance on the economic status of the geographic area in which schools are located. This is especially true because a significant number of Texas school districts are property poor. As the trial court found, the present system is not financially efficient. (F.F. p.67)

## Prayer for Relief

In Texas, education is, and always has been, fundamental. Our current system of funding public schools relies in great part on revenues generated through local property taxes. The poorest school districts, which generally impose a much greater property tax rate than wealthier districts, are able to raise substantially less revenues at the local level because of reduced property values. As a result of unequal revenue raising abilities, the present public school system is comprised to two distinct classes of school districts: wealthy school districts that provides a variety of quality education programs; and poor schools districts that cannot provide adequate teachers and administrators, library facilities, curriculum and staff development specialists, and other programs indispensable to a quality education. The quality of education is inextricably tied to the school district's ability to raise sufficient funds through local property taxes. Schools located in agricultural areas of Texas have a disproportionate share of poor

schools, and manifest the worst effects of the present funding system. Texas should adopt a funding system which takes into account the inability of some local school districts to raise sufficient revenues to provide equal educational opportunity.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

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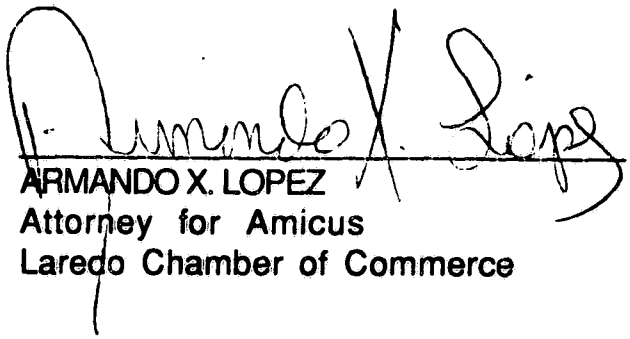

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NO. C-8353

IN THE
SUPREME COURT OF TEXAS
AUSTIN, TEXAS

EDGEWOOD INDEPENDENT SCHOOL DISTRICT, ET AL

PETITIONERS

VS.

WILLIAM N. KIRBY, ET AL

RESPONDENTS

# AMICUS CURIAE BRIEF OF SENFRONIA THOMPSON MEMBER, TEXAS HOUSE OF REPRESENTATIVES DISTRICT 141 ON BEHALF OF PETITIONERS

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## PRELIMINARY STATEMENT

TO THE HONORABLE SUPREME COURT OF TEXAS:

As a member of the Texas Legislature and a State Representative for Texas House District 141 in which the North Forest Independent School District is situated, I submit this Amicus Curiae Brief. I urge the supreme Court to affirm the judgment of the District Court in Edgewood Independent School Dist. v. Kirby, that the Texas School Financing System is violative of the Texas Constitution, and to reverse the Court of Appeals decision which reversed the District Court judgment.

The case of Edgewood Independent School District v. Kirby presents several significant issues regarding public education in Texas. However, the primary issue strikes at the heart of Texas sovereignty. This Honorable Court must defend the provisions of the Texas Constitution. We contend that the Texas Constitution is the fundamental law of Texas. It complements the United States Constitution, yet affords to the citizens of Texas additional rights and privileges. Further, we submit that if the Texas Constitution is to be fundamental law in Texas then it is essential that the judiciary interpret the Constitution so as to safeguard the public welfare and to carry out the intent of its framers. Hence, when the constitutionality of a legislative act is challenged, the legislative act must satisfy a "two-pronged" test.

The legislative act must pass constitutional muster under the United States Constitution and the Texas Constitution. Absent this two-pronged analysis, the Texas Constitution would be reduced to worthless dictum.

In the case at bar, the constitutionality of the Texas School Financing System is challenged. We contend that the District Court properly declared education to be a fundamental right in Texas, guaranteed by art. VII, §1 of the Texas Constitution. We also submit that the District Court properly applied the strict scrutiny standard of review to adjudge the constitutionality of the legislative act. Under the strict scrutiny analysis, the Texas School Financing System is clearly violative of the equal rights provision, art. I., §3, of the Texas Constitution, thus unconstitutional and unenforceable in law.

We further submit that it is within judicial authority to test the constitutionality of legislative acts and that judicial review of the issues presented in Edgewood does not conflict with the separation of powers doctrine. The provision of an efficient system of public education is not a political question which would require the Court to abstain from judicial review and the Texas Constitution does not render questions regarding the constitutionality of an education financing scheme non-justiciable. It is the duty of the judiciary to preserve constitutional rights under the federal and state constitutions. Part of this duty

includes preventing the Texas Legislature from acting in derogation of the Texas Constitution.

Several United States Supreme Court decisions have addressed issues regarding public education. We submit that the District Court's decision is consistent with and not contradictory to these decisions. Although the federal Constitution does not explicitly speak to the issue of public education, the Supreme Court has suggested that public education is a local concern to be assessed by the local governmental authorities. The District Court's decision in Edgewood amplifies this concept of local control by recognizing that under the Texas Constitution public education is a fundamental right to be effectuated by the three branches of local government; establishment by the legislature, implementation by the executive, and review under the Constitution by the judiciary.

Finally, we present several decisions rendered in other jurisdictions which support the District Court's holding that education originates as a fundamental right under the Texas Constitution. The Courts in these jurisdictions have not hesitated to declare similar public school financing systems unconstitutional under their respective state constitutions. Thus, we urge this Honorable Court to follow suit by pronouncing the importance of public education in Texas as intended by the framers of the Texas Constitution and to protect this right against unconstitutional infringement.

I.

THE COURT OF APPEALS ERRED IN HOLDING THAT THE TEXAS SCHOOL FINANCING SYSTEM IS NOT VIOLATIVE OF THE EQUAL RIGHTS PROVISION, ARTICLE I, §3 OF THE TEXAS CONSTITUTION.

The Court of Appeals held that the current school financing system did not violate the equal rights provision of the Texas Constitution. To reach this conclusion, the Court stated that education is not a fundamental right; thus, under the rational basis analysis the school financing system passed a very tolerant form of constitutional scrutiny. We submit that the Court of Appeals erred in applying the rational basis standard of review. Education is a fundamental right originating under the Texas Constitution. As such, the proper standard of review is strict scrutiny, and under this exacting test the current school financing system is clearly violative of the Texas equal rights provisions.

We submit that the District Court properly concluded that the Texas School Financing System,[1] "implemented in conjunction with local school district boundaries that contain unequal taxable property wealth for the financing of public education,"[2] violates the equal rights provision of the Texas Constitution. The court stated that the present financing scheme "fails to insure that each

1. TEX. EDUC. CODE ANN. §16.01, et. seq. (Vernon 1988).

2. Judgment, June 1, 1987 at 6, (hereinafter referred to a Judgment).

school district in this state has the same ability as every other district to obtain, by state legislative appropriation or by local taxation, or both, funds for education expenditures . . ."[3] Further, the District Court declared that the financing system "denies . . . over one million school children attending school in property-poor school districts, the equal protection of the law, equality under the law and privileges and immunities, all guaranteed by Art. I, §§3, 3A, 19, and 29 of the Texas Constitution."[4]

TEX. CONST. art. I, §3 reads that:

> "All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services."

The petitioners in Edgewood assert that the Texas School Financing System is unconstitutional. In Texas, challenge to the constitutionality of a statute or regulation triggers the same equal protection analysis used by the United States Supreme Court. "Under the equal protection analysis, different levels of judicial scrutiny are applied depending upon the type of individual right which the state has chosen to affect through legislative classification." Lucas v. United States, 757 S.W.2d 687, 695. See also Sullivan v. University Interscholastic League, 616 S.W.2d 170,172 (Tex. 1981).

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3. Judgment at 5.

4. Judgment at 6.

As stated in Spring Branch I.S.D. v. Stamos, "[t]he first determination this Court must make in the context of equal protection analysis is the appropriate standard of review. When a state regulatory scheme neither infringes upon fundamental rights or interests nor burdens an inherently suspect class, the equal protection analysis requires that the classification be rationally related to a legitimate state interest." 695 S.W.2d at 559. When the legislative act in question impinges upon a fundamental right, the rule of strict scrutiny applies and the legislative act must be supported by a compelling state interest. 695 S.W.2d at 560. The Court in Stamos relied on the Court's decision in Bell v. Lone Oak Independent School Dist., 507 S.W.2d 636 (Tex.Civ.App.-Texarkana modified on other grounds, 515 S.W.2d 252 (Tex. 1974), which held that if the state and school district provide a free system of public education then it must be administered in a manner in which the students are treated equally. 507 S.W.2d at 638.

A. Education is a fundamental right guaranteed by Article VII §1 of the Texas Constitution.

It is a well established principle of Texas law that "fundamental rights have their genesis in express and implied protections of personal liberty, recognized in federal and state constitutions." Spring Branch I.S.D. v. Stamos, 695 S.W.2d 556, 558 (1985). In light thereof, the District Court properly held that

art. VII, §1 of the Texas Constitution creates a fundamental right to education. TEX.CONST. art. VII, §1 reads that:

> "A general diffusion of knowledge being essential to the preservation of the LIBERTIES and RIGHTS of the people, it shall be the duty of the Legislature of the State to ESTABLISH and make SUITABLE provision for the SUPPORT and MAINTENANCE of an EFFICIENT system of public free schools. (Emphasis added.)

The express language of this constitutional provision is unambiguous. Article VII §1 mandates that a quality public education shall be provided for every child in the state of Texas. The framers of our state constitution were fully cognizant of the value of education and therein mandated that the state legislature establish, support and maintain an "efficient" public school system.

The Court of Appeals reiterated that access to public education is not a fundamental right guaranteed by the United States Constitution. Respondents and the Court of Appeals mistakenly rely solely on the federal Constitution for a definition of fundamental rights. The right to education is not considered as a right originating under the federal Constitution. However, it is well established that a state may create rights for its citizens that reach above and beyond the federal Constitution. Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980). Such is the case with public education in Texas. As recently stated by the Texas Supreme Court in Lucas v. United States of America, supra,

"While state constitutions cannot subtract from rights guaranteed by the United States Constitution, state constitutions can and often do provide additional rights for their citizens. The federal constitution sets the floor for individual rights; state constitutions establish the ceiling. Recently, state courts have not hesitated to look to their own constitutions to protect individual rights. This court has been in the mainstream of that movement.

Like the citizens of other states, Texans have adopted state constitutions to restrict governmental power and guarantee individual rights. The powers restricted and the individual rights guaranteed in the present constitution reflect Texas' values, customs, and traditions. Our constitution has independent vitality, and this court has the power and duty to protect the additional state guaranteed rights of all Texans. By enforcing our constitution, we provide Texans with their full individual rights and strengthen federalism." (quoting LeCroy v. Hanlon) (Emphasis mine.) 757 S.W.2d at 695.

Clearly, the right to public education is firmly embedded in art. VII, §1 of the Texas Constitution. Article VII, §1 discloses a well-considered purpose on the part of the framers to bring about the establishment and maintenance of a comprehensive system of public education. Mumme v. Marrs, 120 Tex. 383, 40 S.W.2d 31 (1931).

In refusing to regard education as a fundamental right in Texas, the Court of Appeals reasoned that "the Texas Constitution addresses a great number of subjects, the large majority of which are not fundamental rights," and further that "the Texas Constitution contains many provisions that are usually the subject for legislation." 761 S.W.2d at 862. This assertion cannot withstand analysis. While there may be provisions of the Texas

Constitution which are not fundamental, in this last decade the Texas Supreme Court has not hesitated to declare numerous individual rights as fundamental under the state constitution. See e.g., LeCroy v. Hanlon, 713 S.W.2d 335 (Tex. 1986); (open courts provision, art. I, §12); Whitworth v. Bynum, 699 S.W.2d 194 (Tex. 1985) (equal protection provision, art. I, §3); Haynes v. City of Abilene, 659 S.W.2d 638 (Tex. 1983) (property rights, art. I, §17); Hajek v. Bill Mowbray Motors, Inc., 647 S.W.2d 253 (Tex. 1983) (free speech, art. I, §8). Hence, we request that this Honorable Court follow this wise progression and recognize that education is also a fundamental right created under the Texas Constitution.

In light of the very first clause of art. VII, §1 -- "A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people"-- the express intent of the Texas Constitution to make education at least the equivalent of other rights declared fundamental by the Texas Supreme Court, if not the preeminent right of all, cannot be doubted. Moreover, since art. VII, §1 does not set forth in detail the particulars of Texas' public school system, it is clearly not akin to a legislative enactment but rather a mandate to the legislature to develop the details in accordance with the constitution's directive.

Two other assertions of the Court of Appeals as regards the fundamental nature of education cannot withstand analysis. The

Court inferred that fundamental rights are by nature negative rather than positive, i.e., that they declare what the state may not do and not what the state must do. This is plainly wrong. The right not to be prohibited from the free exercise of one's religion is a negative right against governmental interference, whereas the rights in a criminal proceeding to a jury trial and free counsel in the case of indigence mandate the government to affirmatively provide these services. In this regard art. VII, §1 of the Texas Constitution could hardly be clearer: "It shall be the duty of the legislature to establish and make suitable provision..." The right to public education in Texas is an affirmative right because the Constitution expressly requires the legislature to provide it.

Finally, the Court of Appeals inferred that art. VII, §1 is merely a grant of power to the legislature and not a limitation on its power. Prior decisions of the Texas Supreme Court, as well as the plain language of the Constitution, belie this assertion. The Texas Supreme Court has held the Texas Constitution to be one of limitation rather than of grant. Shepherd v. San Jacinto Junior College District, 363 S.W. 2d 742 (Tex. 1962). This means that the legislature is empowered to act unless the Constitution prohibits or limits its actions. Such is clearly the case here. Article VII,§1 does not authorize the legislature to establish a public education system, an act the legislature could freely do even if the Constitution were silent. Rather, art. VII, §1 expressly makes

it the legislature's "duty" to do so. Moreover, the details are not left totally to the legislature's discretion; rather it must make "suitable " provision for an "efficient" system of public education. These are clearly words of limitation which qualify the legislature's duty, and must be complied with if the intent of the Constitution is to be fulfilled. Since a financing scheme with the inequities of the one currently in place cannot by any stretch of the imagination be deemed suitable or efficient, a fact publicly acknowledged by virtually every official in the state who has spoken to the issue, it is the duty of this Honorable Court, in carrying out its constitutional function, to order the legislature to comply with the express provisions of art. VII, §1.

B. Applying the strict scrutiny analysis, the "Texas School Financing System" is violative of the Texas equal rights provision.

Given that education is a fundamental right under the Texas Constitution, we submit that the current system of school financing is violative of the Texas equal rights provision, art. I, §3, and art. VII, §1. Thus, this Court is called upon to determine the constitutionality of the legislative act creating the current school financing system.

When a fundamental right is at issue, the proper standard of review is strict scrutiny. Spring Branch ISD v. Stamos, supra. Likewise, in Bell v. Lone Oak ISD, 507 S.W.2d 636 (Tex. Civ. App. -

Texarkana, modified on other grounds, 515 S.W.2d 252 (Tex. 1974)), the Court concluded that under Texas law marriage is a fundamental right. Under the strict scrutiny test, the regulation which impinged upon the right of marriage was struck down because the school district failed to show a compelling interest to support its enforcement. 507 S.W.2d at 638.

The Bell decision is analogous to the District Court's decision in the case at bar. In Edgewood, given that education is a fundamental right and applying the strict scrutiny standard of review, the legislature must demonstrate that a compelling state interest exists to support the grossly inequitable school financing system. The Texas School Financing System effectively over-compensates the wealthy school districts and undercompensates the education of those unfortunate children who live in property poor school districts. We contend that the legislature cannot articulate a state interest so compelling as to justify the present financing scheme. Thus, the school financing system does not pass constitutional muster.

Undoubtedly, education is the key to a child's success, especially if the child is a member of an impoverished family and community. As the United States Supreme Court restated in Plyler v. Doe, 457 U.S. 202 (1982):

> "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the

> importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." (quoting Brown v. Bd. of Education)

Under the present financing scheme some children are denied the equal opportunity to succeed. Therefore, in the interest of fairness and substantial justice, the Texas School Financing System must be recognized as unconstitutional and unenforceable in law.

C. The Supreme Court Decision in San Antonio ISD v. Rodriguez supports education as a fundamental right in Texas.

Much has been made of the opinion of the United States Supreme Court in San Antonio Independent School District v. Rodriguez, 441 U.S. 1 (1973), as such might affect this Court's decision as to whether or not art. VII, §1 guarantees to the citizens of the State of Texas a fundamental right to a "suitable" and "efficient" education. It is well established that under Rodriguez education is not a fundamental right entitled to strict judicial protection, under the United States Constitution. We submit in support of the District Court's decision that the Constitution of Texas unequivocally guarantees to its citizens the fundamental right to an education for precisely the same reasons that the United States

Supreme Court reached a contrary conclusion in Rodriguez. Thus, the decision in Rodriguez is not only distinguishable from the issue before the Court in Edgewood, but is entirely consistent with it.

The central question posed for the Court in the Rodriguez case was "whether there is a right to education explicitly or implicitly guaranteed by the Constitution." 411 U.S. at 18. Since, as Justice Powell writing for the majority concluded, "education is not among the rights afforded explicit protection under our Federal Constitution," the Court was asked by the Plaintiffs to "create substantive constitutional guarantees" as "implicitly" drawn from non-interpretive constitutional norms. 411 U.S. at 18.[5] This process, as an out-growth of the "Substantive Due Process" methodology applied by the Court in the "Lockner era," is quite controversial.[6] Particularly given the Court's decision in Roe v. Wade, 410 U.S. 179 (1973), the modern era has seen much controversy

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5. Non-interpretive in the sense that the Court may extract contemporary "fundamental rights" from the broad clauses of the Constitution although these may not be traceable to either the explicit or implicit language that the framers chose. This term has replaced the "activist" or "natural law" labels in hopes of ridding ourselves of their excess baggage. See Grey, "Do We Have an Unwritten Constitution?" 27 Stan. L. Rev. 703 (1975), and Ely, Democracy and Distrust, 1-9, (1980).

6. Lockner v. New York, 198 U.S. 45 (1905); "Controversial" in the sense that the Court used the Fourteenth Amendment Due Process Clause to create substantive rights that were used, in the view of many critics, to translate their own economic precepts into constitutional law. See L. Tribe, American Constitutional Law 569-86 (2nd. Ed. 1988).

and debate surrounding "Court created fundamental rights" as based upon the Constitution's broad clauses.[7]

The Rodriguez opinion has been most often cited to and referenced as an indication of the reluctance and hesitancy of the Court in the "Burger years" to specify as fundamental, rights that are not explicitly grounded in the Constitution and its language.[8] It has become, in short, the major authority for illustrating the Court's unwillingness to "create" fundamental rights, and most certainly not as an indication of the Court's rejection of the meaning and importance of education. This was made clear by the Court itself when Justice Powell stipulated:

> It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus the key to discerning whether education is "fundamental" is not to be found in comparisons of the relative societal significance of education . . . . Rather the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution. 411 U.S. at 1297.

This limitation of the "fundamental rights" methodology to the "explicit or implicit" language of the Constitution has become the

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7. See, among others, Ely, "The Wages of Crying Wolf: A Comment on Roe v. Wade," 82 Yale L. J. 920 (1973), for the revival of the "Lockner" controversy as extending from the decision in Roe.

8. See, for example, the use of the Rodriguez opinion in Gunther's Constitutional Law text to describe "The Burger Court's General Stance" on "Fundamental Rights and Interests." G. Gunther, Cases and Materials on Constitutional Law 787-799 (11th Ed. 1985).

"guiding light" and most significant determination in the Rodriguez opinion.

We submit that had the United States Supreme Court been interpreting the Texas Constitution and the "explicit" rights guaranteed by art. VII, §1, in the Rodriguez circumstance, it, in application of the standards cited above, would have inescapably reached the conclusion that education is a fundamental right. Thus, Rodriguez is distinguishable from Edgewood precisely because the "right of the people" in Texas to a free education is "explicitly" and in strict-constructionist/clause-bound terms guaranteed.

The Rodriguez decision is also supportive of the conclusion that in Texas education is a fundamental right. As the Court noted: "[T]he key to discovering whether education is fundamental . . . lies in assessing whether there is a right to education explicitly . . . guaranteed by the Constitution." 411 U.S. at 1297. The Texas Constitution, as opposed to the Federal, does so explicitly guarantee! In fact, given the specific commands of Article VII, Section I, we submit that for a Court to not so hold would be to cast aside the explicit language of the Constitution in favor of a Court's own predilections.

Those who framed the Texas Constitution have already decided this issue. A citation by the majority in Rodriguez to Justice Stewart's opinion in Shapiro v. Thompson, 394 U.S. 618 (1969), best

describes the relief requested in Edgewood, and the judicial methodology that the Court applied in Rodriguez:

> The Court today does not 'pick out particular human activities, characterize them as 'fundamental,' and give them added protection . . .' To the contrary, the Court simply recognizes, as it must, an established constitutional right and gives to that right no less protection than the Constitution itself demands. 411 U.S. at 1295. (Emphasis from original)

The judicial branch of government must necessarily possess the power to declare those legislative acts invalid that are contrary to the Constitution. This is not only the meaning of judicial review and separation of powers in Texas, but it is also the means of assuring that the Constitution is supreme and fundamental law.

D. The issue of local control noted in San Antonio ISD v. Rodriguez supports judicial review of the "Texas School Financing System".

The final assertion and reference to the Rodriguez opinion by the Court of Appeals concerns the issue of "local control." We contend that the issue of local control need not be affected by any remedy sought herein. Moreover, we submit that the holding in Rodriguez has been misread in this context. The concerns expressed over local control by the Court in Rodriguez were directed toward "Federalism" as a limitation on federal judicial intervention in an area traditionally reserved to state government, i.e. education. 411 U.S. at 1303-1310

Thus, the Court in Rodriguez noted that "the Justices on this Court lack both the expertise and the familiarity with local problems necessary to the making of wise decisions," 411 U.S. at 1301; and that "we are unwilling to assume for ourselves a level of wisdom superior to that of . . . authorities in the 50 states," 411 U.S. at 1308; and finally:

> While '[t]he maintenance of the principles of federalism is a foremost consideration in interpreting any of the pertinent provisions under which this Court examines state action,' it would be difficult to imagine a case having a greater potential impact on our federal system than the one now before us, in which we are urged to abrogate systems of financing public education presently in existence in virtually every State. 411 U.S. at 1302.

Assuredly the "apple pie" here that all parties agree on is "local control" by local school districts. Beyond the context of funding, this is not an issue in this case, nor need it be affected by a remedy for so disparate an allocation of funding. Even to state that a body that is one of the co-equal branches of state government, and whose duty in interpreting the Texas Constitution is "to say what the law is," is not "local" within the context of Rodriguez, is to misstate the opinion. In fact the flow of constitutional law has, as of recent, been toward a revival of state constitutions.[9] The resolution of the issues raised in

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9. For a review of this expanding and active area See, Tribe, supra note 8, at 166, n27. See also, Symposium: The Emergence of State Constitutional Law, 63 Texas L. Rev. 959 (1985); Rediscovering State Constitutions For Individual Rights Protection, 37 Baylor L. Rev. 163 (1985).

Edgewood by our Constitution is we reply, representative of the same.

E. The "plain meaning" rule of constitutional interpretation supports the finding that education is a fundamental right in Texas.

Over the years, the legislature has demonstrated a total indifference towards the educational funding needs of those students who reside in property poor school districts. The Court of Appeals contends that judicial intervention into matters of public education is unauthorized. In doing such they avoid both the plain meaning of Article VII, §1, and the obvious intent of those who framed Section 1 and voted for its adoption.

The Court of Appeals, in fact, avoids interpreting the plain meaning, language and intent of art. VII, §1. They provide us with only a generalized discussion of this constitutional language, almost in passing, as they reject Petitioners' contentions, because "the Texas Constitution addresses a great number of subjects." 761 S.W.2d at 862. The short of this discussion can be summed up by the majority's view that just "because education is mentioned in the Texas Constitution" does not mean that education is a fundamental right. But, what then does it mean? What do the plain words mean? Why were they enacted? Here there is no response. The Court of Appeals appears to interpret the Texas Constitution as it sees fit, avoiding its plain meaning and intent. In doing such, and without explanation, they in effect read art. VII, §1 out of

the Constitution, relegating its status to the whim of legislative majorities. What for example would occur if despite the Constitution the legislature did not provide any free or public education? The Court of Appeals, despite the Constitution itself, affords us no response. They simply substitute their will for the explicit language of the document.

Yet, quite interestingly enough, when it comes to the Court of Appeals' conclusion in regard to the meaning of this constitutional language and "local control" of education, (a concept we not only would advance ourselves, but one which we feel is entirely consistent with a constitutionally enforced fundamental right to an education), the Court becomes the paragon of strict constructionism. Thus we are told, "if the meaning of the language of the constitutional provision is plain, it must be given effect without regard to the consequences", or that "Our duty, then is to examine the words of the Constitution" and to "give effect to the intent of the voters who adopted it." (Emphasis mine) 761 S.W.2d at 865. While we concur with Chief Justice Shannon as he defines the duty of a Court so circumstanced, we would request that the Court below be consistent and apply these standards of interpretation to all of the language of the Texas Constitution.

Yet, the majority below failed to exercise this "duty" in regard to the Constitution's mandate for a "suitable" and "efficient system of free schools." In fact, the words free

schools, suitable, and efficient are clear on their face. Black's Law Dictionary, for example, defines efficient as "adequate performance or producing properly a desired effect" and suitable as "appropriate for the end in view." (Blacks Law Dictionary 1603, 605 (4th ed. 1968) Thus, it would be appropriate to suggest that the legislature is charged with providing a "suitable" education that produces the Constitution's desired effect, and an "efficient" system or one that provides for "adequate performance." This is clearly not the case in Texas today, especially in regard to poor and minority Texans, and to go beyond the plain meaning of the Constitution, where the express intent of those who adopted it is not to the contrary, is to replace the views of judges for those of the Constitution. Constitutional government mandates that we must not be governed, in the words of Judge Learned Hand, by judges who by imposing their own views rather than those of the Constitution itself, become "Platonic Guardians." (Hand, The Bill of Rights 1958)

As Justice Gammage referenced, in his dissenting opinion:

> In determining original intent, we look first to the literal text of the provision in question. . . Where the terms of the provision are clear, that which the words declare is the meaning of the provision unless such literal interpretation would lead to a result not intended by the voters. 761 S.W.2d 873.

The Court of Appeals, we submit, has avoided the clear intent of the Constitution precisely because the Court disagrees with "these consequences." In Texas we demand that our courts strictly